

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

STATE OF NEW YORK, *et al.*,

Plaintiffs

v.

MICROSOFT CORPORATION,

Defendant.

Civil Action No. 98-1233 (CKK)

ORDER

Pending before the Court is a request by non-Party Qwest Communications International, Inc. (“Qwest”) that a particular document be received into evidence under seal and that any inquiry regarding the document be conducted under seal in a closed courtroom. Qwest Services Corporation¹ Senior Vice President for Corporate Strategy Gregg Sutherland has been presented as a witness by Defendant Microsoft in conjunction with a hearing being held on the appropriate remedy for antitrust violations found by the District Court in this case and affirmed by the Court of Appeals. Having received proffers from Qwest and the Plaintiff Litigating States and upon review of the document, the Court concludes that Qwest’s motion to seal the document and to close the courtroom for a limited period of time shall be granted.

Pursuant to Qwest’s motion, the Court discussed the issue with counsel for Plaintiffs, Microsoft, and Qwest on the record in a bench conference, the transcript of which remains under seal. To summarize, during his cross-examination of Mr. Sutherland, counsel for Plaintiffs plans

¹Qwest Services Corporation is a wholly owned subsidiary of Qwest Communications International, Inc.

to ask questions regarding a Joint Marketing Agreement (“JMA”) entered into between Qwest and Defendant Microsoft Corporation. Mr. Sutherland’s responses to this line of questioning are likely to elicit Qwest’s confidential business information. Similarly, display of the JMA itself in open court would reveal Qwest’s confidential business information. Qwest proffered and explained during its sealed colloquy with the Court and the parties that release of this sensitive corporate information would cause substantial harm to Qwest’s competitive position. The parties and Qwest agree that the relevant portion of the cross-examination and redirect should be conducted under seal and that the JMA should be maintained in the record under seal.

Case law from the D.C. Circuit acknowledges that, in general, “[t]he first amendment guarantees the press and the public a general right of access to Court proceedings.” *Washington Post v. Robinson*, 935 F.2d 282, 287 (D.C. Cir. 1991). However, this right of access is far from absolute, as courts have recognized numerous exceptions to the general rule of openness. *See Nixon v. Warner Communications*, 435 U.S. 589, 598 (1978) (listing various exceptions). Although much of the available case law on the subject of openness arises in the criminal context, the “presumption of openness” applies in the civil context as well. *See Johnson v. Greater Southeast Community Hosp. Ctr.*, 951 F.2d 1267, 1277 (D.C. Cir. 1991). This presumption may be overcome “by an overriding interest based on findings that disclosure is essential to preserve higher values and is narrowly tailored to serve that interest.” *Press-Enterprise Co. v. Superior Court of California*, 464 U.S. 501, 510 (1984). Protecting an entity’s “competitive standing” through retained confidentiality in business information has been recognized as an appropriate justification for the restriction of public or press access. *Nixon*, 935 F.2d at 287.

The D.C. Circuit has elaborated that a court contemplating restricting access to court

documents should consider the following six factors:

(1) the need for public access to the documents at issue; (2) the extent to which the public had access to the documents prior to the sealing order; (3) the fact that a party has objected to disclosure and the identity of that party; (4) the strength of the property and privacy interests involved; (5) the possibility of prejudice to those opposing disclosure; and (6) the purposes for which the documents were introduced.

See United States v. Hubbard, 650 F.2d 293, 317-22 (D.C. Cir. 1980). Applying these factors, the Court finds that there is no particular need for public access to the JMA and the testimony relating thereto, aside from the more generalized public interest in these judicial proceedings.

The Court notes that the JMA was produced under special circumstances requiring an amendment to the Court's May 27, 1998, Protective Order to ensure the maintenance of confidentiality. Since its production, the JMA has been treated as "Highly Confidential" pursuant to the Protective Order and the April 24, 2002, supplement thereto. Qwest, a third party, has clearly objected to disclosure of this information in open court and has displayed strong property and privacy interests in maintaining the confidentiality of the information at issue. As noted above, the relevant document and testimony will be introduced as part of the Plaintiff Litigating States' cross-examination and redirect of Mr. Sutherland.

Having reviewed the relevant document and, in light of Plaintiffs' proffered line of inquiry and Qwest's proffered business interest in maintaining confidentiality, the Court finds that any release, via testimony or display of the JMA, would result in "clearly defined and very serious injury" to Qwest's business interest. *United States v. Exxon Corp.*, 94 F.R.D. 250, 251 (D.D.C. 1981) (quoting *United States v. International Business Machines, Corp.*, 67 F.R.D. 40, 46 (S.D.N.Y. 1975)). As a result, the Court concludes that Plaintiffs' inquiry regarding the JMA, as well as any redirect examination, should be conducted under seal, in a closed courtroom. Likewise, the Court concludes that the JMA itself should be filed under seal. In this regard, the

Court notes that the closure of the courtroom and the sealing of the document and testimony are narrowly tailored to include only the specific information which, if released, would be detrimental to Qwest's business interest. *See Press-Enterprise*, 464 U.S. at 510. The relevant information has heretofore remained confidential and would not become public but for its use in these proceedings. Other portions of the cross-examination and redirect of Mr. Sutherland will be held in open court and on the public record, as will all other appropriate portions of evidence in this proceeding.

Accordingly, it is this 29th day of April, 2002, hereby

ORDERED that the above-specified portions of proceedings in this case shall be conducted under seal; and it is further

ORDERED that the JMA shall be filed under seal.

SO ORDERED.

COLLEEN KOLLAR-KOTELLY
United States District Judge